



Boardman, Suhr, Curry & Field

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October 31, 1997

Via Federal Express

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

**Re: In the Matter of Pre-emption of State and Local Zoning
and Land Use Restrictions on the Siting, Placement and
Construction of Broadcast Station Transmission Facilities
MM Docket No. 97-182**

Dear Secretary:

On October 29, 1997, I sent you a letter on behalf of the Town of Elbain the State of Wisconsin. I failed to enclose the extra copies of the letter. Enclosed at this time is another original, along with nine copies. Thank you.

Sincerely yours,

Richard A. Lehmann
Special Counsel, Town of Elba

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enclosures

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FEDERAL COMMUNICATIONS COMMISSION

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**Re: In the Matter of Pre-emption of State and Local Zoning
and Land Use Restrictions on the Siting, Placement and
Construction of Broadcast Station Transmission Facilities
MM Docket No. 97-182**

Ladies and Gentlemen:

We represent a town government in a rural area in the State of Wisconsin. Within a totally rural part of this town, at a site located approximately 40 miles from the edge of a medium size metropolitan area and 60 to 100 miles from the end of other larger medium size metropolitan areas (see attached diagram), a private company proposed to locate a 1,706 foot tall broadcast television tower. To the knowledge of the town government, this tower was totally unrelated to the issue of DTV construction or radio transmission facility relocations resulting from DTV construction.

After extensive public hearings at which the tower sponsors were represented by legal counsel assisted by various technical experts, the application for zoning changes necessary to construct the tower was denied. The process of application, review, public hearings and decision was handled in approximately six months and the applicant offered no serious complaint at the time of the proceedings before the town or within subsequent proceedings in court with respect to the speed of decision making.



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The denial of approval of the 1,706 foot tall broadcast tower was based on a variety of factors, considerations and findings. One significant finding was that the town had a land use plan and a land use pattern established through longstanding zoning. The principal use of the area was exclusively agricultural. The town board determined and the court subsequently endorsed the determination that a broadcast tower of this magnitude was fundamentally inconsistent with agricultural land use.

The town made a finding that the tower would have an adverse effect on property values based upon expert testimony. Property value protection is a legitimate consideration for zoning decisions in Wisconsin. In part, the town decision denying the tower was based upon aesthetics and the vast area that would see the tower given its height and the relatively flat terrain.

The town board found virtually no positive advantages to the town and contrasted this with several negative impacts, including property values, aesthetics and concern about safety dealing with falling ice and debris and car accidents caused by drivers that might be distracted by the height of the tower.

The denial by the town board was immediately challenged in the circuit court. Following a reasonably expedited briefing schedule, the circuit court upheld the decision of the town board. The tower applicants then appealed to the intermediate appellate court of Wisconsin. On September 4, 1997, the Wisconsin Court of Appeals upheld that the circuit court decision, which had upheld the town zoning decision. (Copy of this decision attached hereto.)

The population in the host town was approximately 1,000 persons. Obviously, a 1,706 foot television broadcast tower was not being built to serve the broadcast needs of that small number of immediate neighbors. The object of the developer was to penetrate at least the edge of metropolitan markets located several counties away. The hundreds of thousands of residents living in the target metropolitan markets may well receive some degree of benefit from a new broadcast operation (which this was proposed to be). However, neither the beneficiaries of the broadcast service nor the broadcast company itself should be allowed to dump the problems associated with a tower on the host municipality without that host municipality having some say in the matter.



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The proposed preemption rule pending before the FCC would limit municipal say to health and safety considerations, but most of these have also been preempted by this proposed order or other orders.

The concept of "reciprocity of burden and benefit" plays a central role in land use regulation. That principle is not allowed to function where a proposed broadcaster establishes a huge broadcast tower far, far away from the targeted market/beneficiaries.

In the Town of Elba situation, both the town officials and the two levels of courts that heard the case clearly considered the fact that there is public benefit in broadcast television, as well as the necessity of towers to facilitate those broadcasts. However, this was the wrong location and the wrong size tower, when the adverse impacts on the town were weighed and balanced against the public benefits of broadcast television.

The notice of proposed rulemaking notes that approximately 1,500 television station licenses exist, all or most having broadcast tower facilities, indicating that state and local regulation has likely not been an insuperable obstacle to the activities for which the licenses were issued.

The Town of Elba denial of the 1,706 foot tower proposed by Skycom, Inc. is a limited exception, apparently. However, we feel that it deserves to have been an exception since the proposed site and magnitude of the facility would have been seriously disruptive of the local health, safety and welfare of the community. The process of town-level review occupied approximately six months. Litigation brought by the applicant added another two years and three months up to and through the date of the Court of Appeals decision last September. We believe that the time necessary for a town to process this application, given the fact that the town has no full-time staff and the fact that the application came in during spring planting season and the board members are farmers, was reasonable. The courts found the process of town review to be reasonable and rational.



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In light of the story portrayed above, we strongly urge the FCC to limit any preemption to strictly those towers that are implicated by the DTV mandate.

Sincerely yours,

A handwritten signature in cursive script that reads 'Richard A. Lehmann' with a small 'jm' monogram at the end.

Richard A. Lehmann
Special Counsel, Town of Elba

RAL/mr
Enclosure

cc: Wisconsin Congressional Delegation
Town of Elba, Chairman Russell Farr
(c/o Town Attorney Randall Lueders)
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